IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

Arbitration Petition No. 237 of 2007

Union of India ..Petitioner

vs.

1. Krafter Engineering and
Leasing (P) Ltd. and others ..Respondents

Mr.Suresh Kumar for petitioner.
Mr.V.L.Paranjape for respondent no.1.

**CORAM: S.C.DHARMADHIKARI J.**
**29th August, 2007**

**P.C.**

1. The Union of India has filed this petition under sec.28 of the Arbitration Act, 1940 (Old Act). The relief sought in this petition is that this Court should call for the record and proceedings of the Arbitration and examine the legality of the same. Thereafter this Court should set aside and quash the letter dated 7th June, 2006 by which the authority of Umpire is invoked and to give direction to the Co-Arbitrators to proceed with the arbitration proceedings and publish the award.

2. The other reliefs sought are:-

(b) to hold and declare that the Arbitrators have

not entered into reference on 6.6.2005 and 4 month are required to be counted from the date of entering into reference, and the period of four months cannot be counted from the date of notice given by the Respondent in their rejoinder dated 02.06.2006.

(c) To hold and declare that Shri B.B.Verma was never appointed as Umpire and he has no authority and power to proceed with the matter.

3. The principal grievance is that the invocation of the authority of the Umpire is contrary to law. It is contended that on account of dispute between the petitioner and the respondents, the decision to appoint the Arbitrator was taken. The appointment was made on 16th May, 1997 of the two Arbitrators. One of them retired from Railway service on 27th February, 2003. The other Arbitrator resigned on 15th April, 2003. Thereafter another arbitrator was appointed on 13th July, 2004. The first meeting was held on 6th June, 2005. The Arbitrators did not enter upon the reference but appointment of the Umpire was made and other directions were issued. Time was granted to file the rejoinder till 30th August, 2005. On 18th October, 2005 the Arbitrator sought consent of

Mr.B.B.Verma as earlier Umpire Mr.Samir Jha has resigned.

4. It is contended that the respondent filed rejoinder dated 2nd February, 2006. In the rejoinder, the respondents issued notice under Schedule I, Rule 3 of the Arbitration Act 1940 and called upon the Arbitrator to make the Award within four months from the date of rejoinder cum notice dated 2nd February, 2006. The petitioner requested the Arbitrators to fix the meeting by letter dated 12th May, 2006 and hearing was fixed on 3rd July, 2006. The petitioner states that a letter dated 7th June, 2006 was addressed by the respondent to the learned Arbitrator and to Umpire. Therein they referred to their notice dated 2nd February, 2006. The contended that four months time has elapsed and, therefore, the Umpire should enter upon the reference forthwith. Thus, they invoked the authority of the Umpire to take over the reference and make and publish the Award. The petitioner, therefore, requested the Arbitrators to fix up the meeting and that was fixed on 3rd March, 2007. It is contended by the petitioner that the authority of the Umpire can be invoked only when the Arbitrators did not agree with each other. The Arbitrators have yet to enter upon the reference and apply their mind. There is no difference between them in

sofar as the disputes referred to for their adjudication and that is how the Umpire could not take over.

5. Mr.Kumar, learned Counsel appearing in support of this petition, invites my attention to section 3 of the Arbitration Act, 1940 and Schedule I Rule 3 thereof. He also invites my attention to Section 28 of the Arbitration Act, 1940. Reliance was placed by him upon the decision of the Supreme Court in the matter of Hari Shankar Lal Vs.Shambhu Nath and others reported in A.I.R.1962 SC 78.

6. To my mind, the basic issue would be maintainability of this petition itself. I called upon Mr.Kumar to satisfy me with regard to the provisions which enable the Union of India to file a petition claiming such reliefs and that too at this stage. All that Mr.Kumar would urge is that the petition may be styled as one filed under sec.28 but in effect this Court’s jurisdiction under sec.5 of the Act has been invoked by the Union of India. Section 5 of the Act reads thus:

> "5.Authority of appointed arbitrator or umpire irrevocable except by leave of Court- The authority of an appointed arbitrator or umpire shall not be revocable except with the leave of the Court,

> unless a contrary intention is expressed in the arbitration agreement."

A bare reading of the same would indicate that the authority of the appointed Arbitrator or Umpire is irrevocable except by leave of the Court. There is nothing in the present petition which would enable the Court to exercise its powers under sec.5. On the other hand what is urged is that the Arbitrators having not diferred with each other, the Umpire could not have entered upon the reference. This touches to the jurisdiction of the Umpire. That the Umpire has entered upon the reference and is proceeding ahead is the principal grievance. If the Umpire has no authority and jurisdiction to do so, then, that aspect of the matter cannot be highlighted in the present petition as it is filed under sec.28 of the Act. Section 28 reads thus:

> "28. Power to Court only to enlarge time for making award:-(1)The Court may, if it thinks fit, whether the time for making the award has expired or not and whether the award has been made or not, enlarge from time to time, the time for making the

award.

(2) Any provision in an arbitration agreement whereby the arbitrators or umpire may, except with the consent of all the parties to the agreement, enlarge the time for making the award, shall be void and of no effect."

7. To my mind, considering the reliefs claimed and provision that is sought to be invoked, the present petition is not maintainable. Even otherwise, merely because the umpire has commenced the proceedings, does not mean that Union of India is precluded from raising a challenge to his authority and jurisdiction, at a later stage. Its participation in the proceedings does not mean that it is precluded from all times to come to raise any challenge on this aspect. Even after the award is rendered and if the same is adverse to the petitioner, while challenging the same, this issue can be high lighted. This aspect is clear from the decision of the Hon'ble Supreme Court in the matter of State of Punjab V.Hardyal reported in A.I.R.1985 Supreme Court 920. The Supreme Court observed thus in paras 13 and 14 of the judgment:-

"13. Once we hold that the law precludes parties from extending time after the matter has been referred to the arbitrator, it will be contradiction in terms to hold that the same result can be brought about by the conduct of the parties. The age long established principle is that there can be no estoppel against a statute. It is true that the time to be fixed for making the award was initially one of the agreement between the parties but it does not follow that in the face of a clear prohibition by law that the time fixed under cl.3 of the Schedule can only be extended by the Court and not by the parties at any stage, it still remains a matter of agreement and the rule of estoppel operates. It need be hardly emphasized that the Act has injuncted the arbitrator to give an award within the prescribed period of four months unless the same is extended by the Court. The arbitrator has no jurisdiction to make an award after the fixed time. If the award made beyond the time is invalid the parties are not estopped by their conduct from challenging the award on the ground that it was made beyond time merely because of their having participated in the proceedings before the arbitrator after the expiry of the

prescribed period.

14. The policy of law seems to be that the arbitration proceedings should not be unduly prolonged. The arbitrator therefore has to give the award within the time prescribed or such extended time as the Court concerned may in its discretion extend and the Court alone has been given the power to extend time even after the award has been given or after the expiry of the period prescribed for the award. But the Court has to exercise its discretion in a judicial manner. The High Court in our opinion was justified in taking the view that it did. This power, however, can be exercised even by the appellate Court. The present appeal has remained pending in this Court since 1970. No useful purpose will be served in remanding the case to the Trial Court for deciding whether the time should be enlarged in the circumstances of this case. In view of the policy of law that the arbitration proceedings should not be unduly prolonged and in view of the fact that the parties have been taking willing part in the proceedings before the arbitrator without a demur, this will be a fit case, in our opinion, for the

extension of time. We accordingly extend the time for giving the award and the award will be deemed to have been given in time."

8. In such circumstances, I am of the view that the present petition is not maintainable. The Court has no jurisdiction at this stage under sec.28 of the Act to interfere with the proceedings. Merely because in the opinion of the Union of India, the authority and jurisdiction of the Umpire is an aspect which goes to the root of the matter, that by itself is not enough to interfere with the proceedings. The Union of India can always raise that issue even during the course of its challenge to the award, if the same is adverse to its interest. The petition is, therefore, dismissed as not maintainable. Dismissal of the petition does not preclude the Union of India from raising the issues as are highlighted in the petition at a subsequent stage and all contentions of both sides are expressly kept open. No order as to costs.

**(S.C.DHARMADHIKARI J.)**